

1 Colin R. Kass (*pro hac vice*)
2 PROSKAUER ROSE LLP
3 1001 Pennsylvania Ave., N.W.
4 Washington, D.C. 20004
(202) 416-6890
ckass@proskauer.com

5 David A. Munkittrick (*pro hac vice*)
6 PROSKAUER ROSE LLP
7 Eleven Times Square
New York, New York 10036
(212) 969-3000
dmunkittric@proskauer.com

8 *Attorneys for Defendant Bright Data Ltd.*
9 *Additional counsel listed on signature page*

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 X Corp.,

13 Plaintiff,

14 v.

15 BRIGHT DATA LTD.

16 Defendant

17 Case No. 23-cv-03698-WHA

18 Hon. William H. Alsup
Courtroom 12 – 19th Floor
March 28, 2024, 8:00 a.m.

19 **BRIGHT DATA'S MOTION FOR INTERLOCUTORY APPEAL OF**
20 **THE COURT'S PERSONAL JURISDICTION ORDER**

NOTICE OF MOTION

PLEASE TAKE NOTICE that the hearing on Bright Data's Motion for Interlocutory Appeal of the Court's Personal Jurisdiction Order (ECF 67) will take place on March 28, 2024 at 8:00 am.

The motion seeks certification of the Court's February 5, 2024 Order Regarding Personal Jurisdiction (ECF 67) ("Order") for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF ISSUES TO BE DECIDED

1. Whether *Briskin v. Shopify, Inc.*, 87 F.4th 404 (9th Cir. 2023), established a new test or framework for assessing personal jurisdiction over global internet service providers in diversity cases.
 2. Whether, under *Shopify*'s new jurisdictional test, a court must first narrow the jurisdictional allegations under consideration to those "forum-specific" facts that bear a "direct nexus" to the specific claims asserted, and then determine whether those facts exhibit a "prioritization" of the forum, or whether it suffices to find that the plaintiff has alleged "something more" than merely passively operating a website accessed by California residents.
 3. Whether resolution of this controlling issue will materially advance the ultimate termination of the litigation because the facts, circumstances, and legal issues relating to X's tort claims are materially different from its breach of contract claim.

TABLE OF CONTENTS

1	I.	INTRODUCTION	1
2	II.	SHOPIFY ESTABLISHED A NEW TWO-PART TEST GOVERNING A	
3		DIVERSITY COURT'S PERSONAL JURISDICTION OVER GLOBAL	
4		INTERNET PROVIDERS.....	3
5	A.	<i>Shopify's</i> New Two-Part Test	3
6	B.	X's Tort Claims Do Not Satisfy <i>Shopify's</i> Two-Part Test.....	7
7	III.	THE COURT'S ORDER SATISFIES ALL THE REQUIREMENTS FOR	
8		INTERLOCUTORY APPEAL.....	11
9	A.	There are Substantial Grounds for Difference of Opinion on the	
10		Implications of <i>Shopify</i>	11
11	B.	An Immediate Appeal Would Materially Advance the Ultimate	
12		Termination of the Litigation.....	13
13	IV.	CONCLUSION.....	15
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

TABLE OF AUTHORITIES¹

2	CASES	PAGES
3	<i>Al Maqaleh v. Gates</i> , 620 F. Supp. 2d 51 (D.D.C. 2009)	13
4		
5	<i>Alhathloul v. DarkMatter Grp.</i> , 2024 WL 493630 (D. Or. 2024).....	1
6		
7	<i>Ass'n of Irritated Residents v. Fred Schakel Dairy</i> , 634 F. Supp. 2d 1081 (E.D. Cal. 2008).....	13
8		
9	<i>Axiom Foods, Inc. v. Acerchem Int'l, Inc.</i> , 874 F.3d 1064 (9th Cir. 2017)	7
10		
11	<i>Bikram Yoga Coll. of India & Fitness, L.P. v. Raiz</i> , 2012 WL 13012446 (C.D. Cal. 2012).....	13
12		
13	<i>Briskin v. Shopify, Inc.</i> , 87 F.4th 404 (9th Cir. 2023)	<i>passim</i>
14		
15	<i>Bryan v. UPS, Inc.</i> , 307 F. Supp. 2d 1108 (N.D. Cal. 2004), (Alsup, J.)	11
16		
17	<i>Doe v. Fullstory, Inc.</i> , 2024 WL 188101 (N.D. Cal. 2024)	1, 5, 12
18		
19	<i>Doe v. WebGroup Czech Republic, A.S.</i> , 2024 WL 609500 (9th Cir. 2024)	6
20		
21	<i>Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.</i> , 592 U.S. 351 (2021).....	6
22		
23	<i>Gilmore v. Jones</i> , 2019 WL 4417490 (W.D. Va. 2019)	13
24		
25	<i>Herbal Brands, Inc. v. Photoplaza, Inc.</i> , 72 F.4th 1085 (9th Cir. 2023)	12
26		
27	<i>Jaco v. WinCo Holdings, Inc.</i> , 2019 WL 2615739 (E.D. Cal. 2019).....	13, 14
28		
29	<i>Kauffman v. Home Depot, Inc.</i> , 2024 WL 221434 (S.D. Cal. 2024).....	1, 4, 12
30		

¹ Unless otherwise specified, all emphasis added, initial capitalizations conformed without brackets, and internal citations and quotation marks omitted.

1	<i>Moda Assurance Co. v. New Life Treatment Ctr.</i> , 2024 WL 181830 (D. Alaska 2024).....	13
2		
3	<i>Reese v. BP Expl. (Alaska) Inc.</i> , 643 F.3d 681 (9th Cir. 2011)	12, 13
4		
5	<i>Sessa v. Ancestry.com Operations Inc.</i> , 2024 WL 195995 (D. Nev. 2024).....	1, 10, 11
6		
7	<i>Silbersher v. Allergan Inc.</i> , 2021 WL 292244 (N.D. Cal. 2021)	13
8		
9	<i>United States v. Cath. Health Sys. of Long Island Inc.</i> , 521 F. Supp. 3d 265 (E.D.N.Y. 2021)	14
10		
11	<i>United States v. Woodbury</i> , 263 F.2d 784 (9th Cir. 1959)	13
12		
13	<i>Walden v. Fiore</i> , 571 U.S. 277 (2014).....	7, 8
14		
15	STATUTES	
16		
17	28 U.S.C. § 1292(b)	3, 11, 13
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION.**

2 Bright Data respectfully requests that the Court certify for immediate appeal its Order
 3 denying Bright Data's motion to dismiss X's tort claims for lack of personal jurisdiction (ECF 67).
 4 Since the Ninth Circuit's landmark decision in *Briskin v. Shopify, Inc.*, 87 F.4th 404 (9th Cir. 2023)
 5 there has been a growing split among the District Courts concerning its application to global
 6 internet providers like Bright Data. While this Court asked whether "Bright Data has done
 7 'something more' than passively operate a website accessed by California residents," ECF 67 at
 8 4, a number of courts have held that *Shopify* fundamentally changed the personal jurisdiction
 9 analysis, imposing significant limits on power of diversity courts to regulate interstate internet
 10 providers. As one court observed a few weeks ago:

11 "The Ninth Circuit's reasoning in [*Shopify*] '***creates a significant shift***' in the
 12 Court's analysis because [*Shopify*] describes a personal jurisdiction test to be
 applied in scenarios such as this one..."

13 "Plaintiffs respond that [*Shopify*] is not a change in controlling law because it
 14 merely applies existing law to it a matter of first impression.... [But] the Court
 15 finds that [*Shopify*] did not merely clarify or confirm existing law. Rather, the
 16 Court agrees with Defendants that [*Shopify*] expanded on the application of
 personal jurisdiction jurisprudence as it applies to website-based contacts and
 established a clear test."

17 *Sessa v. Ancestry.com Operations Inc.*, 2024 WL 195995, *2-3 (D. Nev. 2024) (granting motion
 18 to reconsider, and finding, contrary to its pre-*Shopify* decision, that it did not have personal
 19 jurisdiction over Ancestry.com); *see also Kauffman v. Home Depot, Inc.*, 2024 WL 221434, *2
 20 (S.D. Cal. 2024) (finding that there is no jurisdiction over Home Depot noting that *Shopify* limited
 21 prior precedent dealing with the sale of products through "interactive website[s]" to the sale of
 22 "**physical**" products); *Doe v. Fullstory, Inc.*, 2024 WL 188101, *11 (N.D. Cal. 2024) (holding the
 23 argument that defendant was "expressly aiming [its] conduct to California because [it] processed
 24 and analyzed ... data collected from Class Members in California, and returned that data ... to
 25 Favor, who Fullstory knew was based in California" was "foreclosed" by *Shopify*); *cf. Alhathloul*
 26 *v. DarkMatter Grp.*, 2024 WL 493630, *3 (D. Or. 2024) (limiting jurisdictional discovery to the
 27 "facts relevant to the purposeful direction framework outlined in [*Shopify*]," which is "perhaps the

1 first federal appellate opinion in this country addressing the personal jurisdiction inquiry in cases
 2 ... based on the extraction of ... data.”).

3 Specifically, under *Shopify*’s new, two-part test, courts are directed to first narrow the focus
 4 on only those facts that bear a direct nexus (*i.e.*, give rise to) the tort claim, and then determine
 5 whether those facts exhibit a “forum-specific focus,” by distinguishing the defendants’ forum-
 6 related activities from its general activities in other jurisdictions. 87 F.4th at 419. As we discussed
 7 in our underlying motion, and below, most of the facts X relies on fail the first test, and the
 8 remaining facts fail the second. Respectfully, we believe the Court did not read *Shopify* as
 9 imposing a new jurisdictional test.

10 We believe this is a controlling question of law for which there may be substantial
 11 difference of opinion – specifically:

12 Whether, under *Shopify*’s new jurisdictional test, a court must first narrow the
 13 jurisdictional allegations under consideration to those “forum-specific” facts that
 14 bear a “direct nexus” to the specific claims asserted, and then determine whether
 15 those facts exhibit a “prioritization” of the forum, or whether it suffices to find that
 the plaintiff has alleged “something more” than merely passively operating a
 website accessed by California residents.

16 Resolution of this issue, at this time, will materially advance the litigation, and avoid potentially
 17 wasteful litigation. If *Shopify*’s new test does apply to X’s tort claims, it has the potential for
 18 substantially streamlining this case because X’s tortious interference claims focus largely on
 19 different facts, namely Bright Data’s provision of proxy services to its customers, rather than
 20 Bright Data’s own scraping activities, which is the focus of X’s breach of contract claim.
 21 Resolution of the effect of *Shopify* is also an important question that warrants the Ninth Circuit’s
 22 guidance because – fundamentally – the issue concerns the power of a diversity court to dictate
 23 what general purpose internet services a global internet provider can offer, not just in California,
 24 but potentially worldwide.²

25

26 ² In its Order, the Court expressed concern about the fairness of requiring X to sue in Israel, though
 27 it too operates everywhere. Bright Data notes that Bright Data also has a U.S. subsidiary, Bright
 28 Data, Inc., which is incorporated in Delaware and has a New York office. Bright Data did not
 raise BDI at the hearing because BDI is not itself a defendant, and Bright Data does not believe

1 For these reasons, the Court should certify its Order denying Bright Data's motion to
 2 dismiss for immediate appeal pursuant to 28 U.S.C. § 1292(b). Below, we discuss *Shopify*'s new,
 3 two-part test, followed by application of the § 1292(b) factors.

4 **II. *SHOPIFY ESTABLISHED A NEW TWO-PART TEST GOVERNING A***
DIVERSITY COURT'S PERSONAL JURISDICTION OVER GLOBAL
INTERNET PROVIDERS.

5 **A. *Shopify's New Two-Part Test***

6 In a decision of "first impression," *Shopify* held that, "[w]hen a company operates a
 7 nationally available e-commerce payment platform and is indifferent to the location of end-users,
 8 the extraction and retention of consumer data [the alleged unlawful activity], without more, does
 9 not subject the defendant to specific jurisdiction in the forum where the online purchase was
 10 made." 87 F.4th at 409. The Ninth Circuit said:

11 "Driving our decision-making in this area has been the need to draw some lines to
 12 avoid subjecting web platforms to personal jurisdiction everywhere. Were it
 13 otherwise, every time a seller offered a product for sale through an interactive
 14 website, the seller would be subjecting itself to specific jurisdiction in every forum
 15 in which the website was visible.... That result ... would be too broad to comport
 16 with due process." *Shopify*, 87 F.4th at 417.

17 There is no daylight between *Shopify* and this case. Like Bright Data, *Shopify* is a global e-
 18 commerce platform. Headquartered in Canada, *Shopify* operates virtual storefronts, shopping
 19 carts, and ordering infrastructure that many merchants in California and elsewhere use when
 20 selling their wares online. A class of California plaintiffs accused *Shopify* of collecting and
 21 disseminating their personal information in violation of California's privacy laws. Though the
 22 alleged tortious data extraction occurred in California, the Ninth Circuit held that "as a matter of
 23 due process, web-based platforms cannot be subject to specific jurisdiction in any forum from
 24 which they are accessible." *Id.* at 421. In reaching this conclusion, the Court followed a rigorous
 25 two-step process, analyzing each of *Shopify*'s forum contacts through that lens, and found them
 26 all wanting.

27 that it is an appropriate target of X's suit. It is, however, the employer of all the California
 28 employees X relies on for jurisdictional purposes.

1 ***Step 1: The “Direct Nexus” Test.*** The Court began by first “narrowing [the] allegations
 2 to the conduct relevant to the specific jurisdiction inquiry.” *Id.* at 410-16. As the Court explained,
 3 specific jurisdiction is a “claim-tailored inquiry,” requiring the court to hone in on the “suit-
 4 related” conduct giving rise to plaintiff’s claims. *Id.* Because the “‘arising out of’ portion of the
 5 specific jurisdiction formula asks about causation,” the Court must look to the defendant’s forum-
 6 related activities to determine if there is a “***direct nexus***” between the conduct and the claim. *Id.*
 7 Only conduct that bears “***strong, direct connection*** between the defendant’s forum-related
 8 activities and the plaintiff’s claims” can be considered. *Id.* If the California-related conduct did
 9 not “***cause*** [plaintiff’s] harm,” it is irrelevant. *Id.* This is so even if the defendant’s forum-related
 10 conduct “set the wheels in motion” to “eventually inflict” injury because “such a ***butterfly effect***
 11 ***theory*** of specific jurisdiction would be far too expansive to satisfy due process.” *Id.*

12 In applying this framework, the Court declined to consider Shopify’s “broader California
 13 business contacts,” ***including any facts relating to its maintenance of its e-commerce platform***
 14 ***in California*** (independent of the alleged data extraction) because such activities “did not cause”
 15 plaintiff’s harm. *Id.*; *see also Kauffman*, 2024 WL 221434, at *2 (finding fact that “Home Depot
 16 operates numerous retail stores in California and integrates the website with those stores”
 17 insufficient to establish specific personal jurisdiction). This was so, even though a quarter of
 18 Shopify’s 900-person U.S. workforce was located in California. Shopify also operated a physical
 19 store in California “to expand its access to the California market and enhance relationships with
 20 Shopify’s over ***80,000 merchant-customers*** in the state.” *Shopify*, 87 F.4th at 410.

21 Despite “***extensive***” California contacts, the Ninth Circuit found them ***irrelevant***. *Id.* at
 22 413-14. As the court explained:

23 “Although [the plaintiff] does not argue that these contacts are so pervasive as to
 24 create all-purpose general jurisdiction, he does suggest they are at least relevant to
 25 the specific jurisdiction analysis. That is not correct.” *Id.*
 26 Because evidence of Shopify’s “brick-and-mortar operations in the state” and its “contracts with
 27 merchants in California” were too far removed from the “extraction of … personal information”
 28 on the Shopify platform (the alleged tortious activity), it excluded them from consideration. *Id.*

1 ***Step 2: The “Forum-Specific Prioritization” Test.*** After limiting the field to Shopify’s
 2 data extraction activities (the alleged tortious conduct), the Court proceeded to the second step of
 3 its analysis: determining whether the “*pertinent*” tortious activity exhibited a “*forum-specific*
 4 *focus*” that creates a “*substantial connection*” with the forum. *Id.* at 410-22. Shopify’s allegedly
 5 tortious conduct occurred in California: Shopify operated its platform in California and collected
 6 private information from California end-users by “generating payment forms,” “requiring” them
 7 to reveal personal information, connecting directly to their browsers, “installing cookies” on their
 8 computers, “executing code on [their] devices,” and storing and transmitting their information. *Id.*
 9 Far from passive, Shopify “shared [this information] with its merchant and other business partners”
 10 in California and elsewhere. *Id.*

11 This evidence, however, was not enough to subject Shopify to the jurisdiction of a
 12 California diversity court. As the Ninth Circuit held,

13 “What is needed … is some prioritization of the forum state, some differentiation
 14 of the forum state from other locations, or some focused dedication to the forum
 15 state which permits the conclusion that the defendant’s suit-related conduct
 ‘create[s] a substantial connection’ with the forum....”

16 And that ‘substantial connection’ must be something substantial beyond the
 17 baseline connection that the defendant’s internet presence already creates with
 every jurisdiction through its universally accessible platform.” *Id.* at 420-22.

18 Shopify’s platform did not satisfy the “prioritization” test. Its “platform is accessible across the
 19 United States,” and “the platform is indifferent to the location of either the merchant or the end
 20 consumer.” *Id.* The harm suffered would be identical whether the plaintiff was located in
 21 California or another state, and “would follow him wherever he might choose to live.” *Id.* at 416.

22 To subject a “broadly accessible web platform” to a diversity court’s jurisdiction in such
 23 circumstances, the court held, would “lead[] to due process concerns” because the “implication”
 24 would be that it is “subject to specific jurisdiction in *every* state.” *Id.* at 419-23; *see also FullStory*,
 25 2024 WL 188101, at *11 (“The requisite forum-specific focus for a broadly accessible web
 26 platform like FullStory cannot be established solely by allegations that FullStory knew it was
 27 processing the data of California-based consumers for a California-based merchant, here Favor.

1 Something more is required.”).

2 The Ninth Circuit recognized that, “by this logic, [an internet platform] will be able to
 3 direct its activities to all fifty states and yet be free from specific jurisdiction in each of them.”
 4 *Shopify*, 87 F.4th at 421. Nonetheless, “as a matter of due process, web-based platforms cannot
 5 be subject to specific jurisdiction in any forum from which they are accessible” because that
 6 “would lead to the eventual demise” of all due process constraints on states’ power to regulate
 7 national internet platforms.³

8 A diversity court’s lack of power to regulate a national platform contrasts with the court’s
 9 jurisdictional power when applying federal law. While diversity courts can only entertain claims
 10 against non-resident platforms where its *forum-specific* aspects “give rise” to the plaintiff’s claim,
 11 federal question courts exercise the full scope of Congressional authority and can reach any
 12 internet platform that does business in the United States. The Ninth Circuit clarified this distinction
 13 just weeks after *Shopify* in a case that is otherwise factually indistinguishable.

14 In *Doe v. WebGroup Czech Republic, A.S.*, 2024 WL 609500, *5 (9th Cir. 2024), the Court
 15 held that a court exercising federal question jurisdiction could exercise specific jurisdiction over a
 16 global internet platform, even though no state court could. The plaintiff was a California resident,
 17 part of the tortious conduct (the underlying abuse) occurred in California, and the defendant
 18 contracted with California-based entities to provide its services. The plaintiff conceded that these
 19 facts did not confer diversity court personal jurisdiction. That did not end the inquiry, however,
 20 because a federal court may exercise specific jurisdiction over claims that “***arise[] under federal***
 21 ***law***” based on a platform’s U.S. contacts even where it is not “subject to jurisdiction in any state’s
 22 courts.” *Id.* (quoting Fed. R. Civ. P. 4(k)(2)). A different rule, the Court explained, applied to
 23 plaintiff’s state law claims. Even though most of the defendant’s U.S. contacts were actually
 24 California contacts, the Court could only exercise *pendant* jurisdiction over the state law claims.

25
 26 ³ *Id.* The Court distinguished the “sale of physical items,” which are subject to “a different set of
 27 legal rules” based on “long-held understandings about the jurisdictional significance of physical
 28 shipments into a forum.” *Id.* at 422; see also *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592
 U.S. 351, 366 n.4 (2021) (distinguishing physical sales from “internet transactions”).

1 *Id.* at n.5. That is, it lacked original diversity jurisdiction over the global internet platform.

2 Taken together, *Shopify* and *Doe* establish new rules for personal jurisdiction in data
 3 extraction cases involving global internet platforms: a defendant may be subject to specific
 4 jurisdiction for claims arising under federal law if they do business in the United States, but they
 5 are not subject to the jurisdiction of diversity courts unless the claims arise *directly* out of some
 6 unique forum-specific aspect of their platform. Here, Meta invokes only the Court's diversity
 7 jurisdiction. Thus, *Shopify* controls, not *Doe*.

8 ***B. X's Tort Claims Do Not Satisfy Shopify's Two-Part Test.***

9 X presents four jurisdictional allegations: (i) X's own domicile and California operations;
 10 (ii) Bright Data's general California contacts, including its (now closed) temporary sales office
 11 and its few California employees; (iii) Bright Data's California proxies; and (iv) unnamed
 12 California domiciled customers of Bright Data. FAC (ECF 36) ¶¶ 10-14. None satisfy *Shopify*.
 13 This is because Bright Data provides the same services everywhere regardless of customer or
 14 website location, and X's injuries would be exactly the same absent any California contact.
 15 *Shopify*, 87 F.4th at 414 (no jurisdiction where plaintiff "would have suffered the same injury
 16 regardless of whether he purchased items from a California merchant or was physically present in
 17 California when he did so"). X's claims, therefore, do not arise out of any forum-specific focus.

18 ***X Cannot Base Specific Jurisdiction on Its Domicile or California Operations.*** X's
 19 own "principal place of business" and servers in California are no basis for personal jurisdiction
 20 over Bright Data. FAC ¶¶ 9, 14. "Mere injury to a forum resident is not [] sufficient" because the
 21 "focus" of the jurisdictional inquiry is on where the "relevant conduct" took place, not just the fact
 22 that the "conduct affected plaintiffs with connections to the forum State." *Walden v. Fiore*, 571
 23 U.S. 277, 290-91 (2014). Indeed, the Ninth Circuit long ago overruled prior cases deeming
 24 "individualized targeting" of a forum plaintiff sufficient to establish jurisdiction. *Axiom Foods,
 25 Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1070 (9th Cir. 2017).

26 X has no answer to this. Instead, it seeks to prop up its deficient allegation with more of
 27 its own California contacts: its own "servers in California." FAC ¶ 14. But the location of X's
 28

1 servers is irrelevant because “it is the defendant, not the plaintiff or third parties, who must create
 2 the contacts with the forum State.” *Walden*, 571 U.S. at 291. Put simply, X’s own choices about
 3 how it interacts with the Internet cannot subject Bright Data to the jurisdiction of a California
 4 diversity court.

5 Moreover, X’s injuries do not depend on the location of X’s servers or its primary place of
 6 business. X’s purported injury comes from scraping data that is available worldwide. *Shopify*
 7 again controls. There, the plaintiff was “physically located” in California when Shopify connected
 8 to his device. 87 F.4th at 414-15. Did this “California connection matter to the analysis of whether
 9 Shopify expressly aimed its activities toward California? The answer is no.” *Id.* The plaintiff
 10 “would have suffered the same injury regardless” of his location. *Id.* X’s injury is also the same
 11 whether its server is in California, Alabama, or China.

12 ***X Cannot Base Specific Jurisdiction on Bright Data’s “Broader Business Activities.”***

13 Bright Data’s former sales office is also irrelevant to the personal jurisdiction analysis. The Ninth
 14 Circuit rejected the same argument when considering Shopify’s “extensive” California operations.
 15 And Bright Data’s contacts pale in comparison to Shopify’s. Shopify’s predecessor was “based in
 16 California;” a quarter of its U.S. workers were there; it had a separate physical sales office in Los
 17 Angeles that it opened as a “hub” to expand its California presence; and it had a California
 18 fulfillment center to serve its local merchants and end-users. *Id.* at 410.

19 In contrast, X alleges no facts relating to this workspace, besides that Bright Data listed the
 20 address on its website. FAC ¶¶ 10-11, Figs. 1-2. X makes no allegations that its injuries were
 21 affected by the presence or absence of this office. Bright Data’s few remote California employees
 22 are similarly irrelevant. X alleges no facts that the Bright Data employees X identifies were in any
 23 way involved in the injury causing conduct. *Id.* ¶ 12. X does nothing more than point to the
 24 employee’s LinkedIn pages and say that they are located in California. *Id.* ¶ 12, Ex. C. Put simply,
 25 there is nothing about Bright Data’s offices or employees that suggests Bright Data specifically
 26 targeted or aimed its “suit-related” activities at California.

1 ***X Cannot Base Specific Jurisdiction on Bright Data’s Proxy Infrastructure.*** Bright
 2 Data’s network operates the same way everywhere. X argues that Bright Data targets California
 3 because it offers IP addresses everywhere, including California. FAC ¶¶ 9, 13. But under *Shopify*,
 4 these resources form the “baseline connection [Bright Data] creates with every jurisdiction” to
 5 provide a “universally accessible platform.” *See Shopify*, 87 F.4th at 420. If that sufficed, Bright
 6 Data would be subject to jurisdiction everywhere in the world. Due process does not extend so
 7 far. *Id.* (noting the need to “draw some lines to avoid” the “implication” that a “broadly accessible
 8 web platform” would be “subject to specific jurisdiction in every state.”).

9 If a customer affirmatively selects a California proxy, the request will be routed through
 10 the chosen proxy. FAC ¶ 13, Fig. 3. But then, any prioritization is the customer’s choice, not
 11 Bright Data’s. That does not count against Bright Data. As the Ninth Circuit explained, “[a]ctions
 12 of third parties that the defendant does not control” do not dictate jurisdiction because of the
 13 “greater … attenuation between the plaintiffs’ injuries and the defendant’s jurisdictional contacts.”
 14 *Shopify*, 87 F.4th at 420. A contrary ruling, the Court explained, would “effectively tie personal
 15 jurisdiction to the unilateral activity” of the defendant’s customers. *Id.* at 423.

16 ***X Cannot Base Specific Jurisdiction on Bright Data’s Unnamed California Customers.***
 17 In *Shopify*, the defendant “effectively ‘reached into’ California (electronically) and inserted itself
 18 (technologically) into a transaction between a California consumer and a California merchant,”
 19 acting tortiously while it did so. *Id.* at 415. Yet, this was not enough to subject it to jurisdiction
 20 over claims relating to those transactions because the platform did not exhibit any forum-specific
 21 focus or prioritization. X’s allegations are insufficient for the same reason. X does not allege that
 22 Bright Data targets or prioritizes California customers; nor does it matter where customers choose
 23 to live and work. They can place their computers anywhere in the world. It makes no difference
 24 to Bright Data. And it makes no difference to X.

25 Even if discovery reveals that Bright Data does have California customers, they are
 26 irrelevant to the jurisdictional analysis. FAC ¶¶ 9, 10, 14. Shopify had 80,000 California
 27 customers, and millions of California end-users from whom it unlawfully extracted personal
 28

1 information. If that didn't suffice, neither will Bright Data's California customers.

2 As the Ninth Circuit recognized, because California is a "large market," any nationally-
 3 accessible web platform is "no doubt" bound to have a "sizable ... base" of California customers.
 4 *Shopify*, 87 F.4th at 423. Yet, the fact that a defendant "benefits" from serving these customers
 5 "does not answer the purposeful direction question because a defendant foreseeably profiting from
 6 persons making online purchases in California does not demonstrate express aiming." *Id.* There
 7 must be "something more" distinguishing the California market from other areas of the country,
 8 and it must do so in a way that the claim "arises out of" that "forum-specific focus." *Id.* at 413,
 9 417-18.

10 Whether a "defendant's suit-related conduct" exhibits a forum-specific focus depends on
 11 the nature of the claim. If the claim involves copyright, defamation, or other harm dependent upon
 12 the extent of publication, evidence that the defendant "actively target[ed]" the forum with special
 13 content "appealing to [the local] audience" may suffice. *Cf. Sessa v. Ancestry.com Operations*
 14 *Inc.*, 2024 WL 195995, *2-5 (D. Nev. 2024) (no jurisdiction where ads were "widely"
 15 disseminated, and plaintiffs' likeness were distributed based on familial relationships, but not
 16 location *per se*). If, as in *Shopify*, the claim involves defendant's data extraction, the data collection
 17 activities must be geared toward California. In contrast, there is no jurisdiction where the
 18 defendant actively collects data from California end-users, but does not prioritize or "alter[]" its
 19 data collection activities based on the location of a given online purchaser." 87 F.4th at 419-22.
 20 And, where the claim does not involve the defendant's own data collection, but the inducement of
 21 it, the acts of inducement must be focused on California third-parties if not "to the exclusion of all
 22 others," at least with special "dedication." *Id.*

23 X argues that while "ha[ving]" California customers might not be enough, "target[ing]"
 24 them is. FAC ¶ 13. This is semantics. No one gets customers without "targeting" them. Being
 25 open for business means hanging out a shingle. In any event, none of Bright Data's sales or
 26 marketing activities go beyond those in *Shopify* and X does not allege otherwise.

27 * * *

At its core, the jurisdictional test is simple. Would X's claims be different absent the jurisdictional facts X presents? To quote *Shopify*, “[t]he answer is no.” 87 F.4th at 415. X suffers the same injury when a user in Boise, Idaho scrapes Elon Musk's public X posts as when a user in San Bernadino does the same thing. That defeats jurisdiction under *Shopify*.

III. THE COURT'S ORDER SATISFIES ALL THE REQUIREMENTS FOR INTERLOCUTORY APPEAL

District court judges may certify orders not otherwise appealable if the decision involves a controlling question of law with substantial grounds for differences of opinion, and immediate resolution of which may materially advance the ultimate termination of the litigation.⁴ See 28 U.S.C. § 1292(b). The Court's Order is a prime candidate for interlocutory appeal because the lower courts are adopting divergent and varied views concerning whether *Shopify* adopted a new framework for assessing jurisdiction, and if so, how it should be applied. At one end of the spectrum are courts that believe that *Shopify* merely applied existing law and requires only “something more” than passive operation of a website accessed by California residents. At the other end, are courts that have held that *Shopify* adopted a new, two-part framework, which negates consideration of most of the jurisdictional facts that X relies on, and finds insufficient forum-prioritization as to the remainder. Resolving how the Ninth Circuit intended its decision to apply is a controlling issue that is at the foundation of this Court's Order. Resolving this question will also materially advance the litigation.

A. *There are Substantial Grounds for Difference of Opinion on the Implications of Shopify.*

Though *Shopify* is still new, many district courts have recognized it marks a sea-change in personal jurisdiction as applied to data extraction cases. See, e.g., *Sessa*, 2024 WL 195995, at *3 (“The Ninth Circuit’s reasoning in [Shopify] ‘creates a significant shift’ in the Court’s analysis

⁴ See also *Bryan v. UPS, Inc.*, 307 F. Supp. 2d 1108, 1115 (N.D. Cal. 2004), (Alsup, J.) (certifying a question “of first impression”); Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3930 Criteria for Permissive Appeal (3d ed. 2022) (“Section 1292(b) is best used to inject an element of flexibility into the technical rules of appellate jurisdiction,” requiring courts to “consider the probable gains and losses of immediate appeal.”).

1 because [*Shopify*] describes a personal jurisdiction test to be applied in scenarios such as this one,
 2 and the Court did not apply that test when it analyzed Defendant’s Motion to Dismiss.”); *Kauffman*
 3 *v. Home Depot, Inc.*, 2024 WL 221434, *2 (S.D. Cal. 2024) (recognizing *Shopify* changed the
 4 applicable test and analysis for data extraction cases); *Doe v. FullStory, Inc.*, 2024 WL 188101,
 5 *11 (N.D. Cal. 2024) (*Shopify* “clarified the nature of the personal jurisdiction test to be applied
 6 to a data processing platform”).

7 This Court took a different tack. It did not apply the *Shopify* two-part test, but instead,
 8 sought to answer the question of whether Bright Data was the type of “the non-resident defendant
 9 that specific personal jurisdiction aspires to insulate” by looking at whether “Bright Data has done
 10 ‘something more’ than passively operate a website accessed by California residents, as required.”
 11 ECF 67 at 3-4. At least one other court has also applied a “something more” standard to personal
 12 jurisdiction in the wake of *Shopify*. See *Moda Assurance Co. v. New Life Treatment Ctr.*, 2024
 13 WL 181830, *5 (D. Alaska 2024). But *Shopify*’s test is more rigorous because it requires first the
 14 exclusion of evidence that does not directly give rise to plaintiffs’ claims, and then imposes a
 15 “prioritization” test to the remaining facts. Applying the “something more” test, without going
 16 through *Shopify*’s two-part test, risks basing jurisdiction on the same type of contacts and
 17 “intentional acts” rejected in *Shopify* but described in cases like *Herbal Brands, Inc. v. Photoplaza,*
 18 *Inc.*, 72 F.4th 1085, 1091 (9th Cir. 2023). ECF 67 at 3. As courts have held, however, *Shopify*
 19 “expressly limited *Herbal Brands* to claims arising from ‘defendant’s sale of a physical product to
 20 a consumer in the forum state via an interactive website.’” *Kauffman*, 2024 WL 221434, at *2.

21 Such divergent approaches among district courts show this is a “novel legal issue[] … on
 22 which fair-minded jurists might reach contradictory conclusions” and creates the substantial
 23 grounds for differences of opinion warranting interlocutory review. See *Reese v. BP Expl. (Alaska)*
 24 *Inc.*, 643 F.3d 681, 688 (9th Cir. 2011); see also Wright & Miller, § 3930 (3d ed.) (“The level of
 25 uncertainty required to find a substantial ground for difference of opinion should be adjusted to
 26 meet the importance of the question in the context of the specific case. If proceedings that threaten
 27 to endure for several years depend on an initial question of jurisdiction, limitations, or the like,
 28

1 certification may be justified at a relatively low threshold of doubt.”).

2 The personal jurisdiction question is a particularly compelling candidate for immediate
 3 review because its resolution could not only affect this litigation, but also other cases where *Shopify*
 4 may apply. *See Wright & Miller*, § 3930 (“The opportunity to achieve appellate resolution of an
 5 issue important to other cases may provide an additional reason for certification.”); *Al Maqaleh v.*
 6 *Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) (“[I]nterlocutory appeal is warranted where the
 7 jurisdictional determination will impact numerous cases.”); *Ass’n of Irritated Residents v. Fred*
 8 *Schakel Dairy*, 634 F. Supp. 2d 1081, 1093 (E.D. Cal. 2008) (“The opportunity to achieve appellate
 9 resolution of an issue important to other similarly situated [parties] can provide an additional
 10 reason for certification.”).

11 ***B. An Immediate Appeal Would Materially Advance the Ultimate Termination of***
 12 ***the Litigation.***

13 Resolution of the appropriate personal jurisdiction test would materially advance this
 14 litigation. *Reese*, 643 F.3d at 688; 2 Fed. Proc., L. Ed. § 3:219 (“The determination of whether an
 15 interlocutory appeal may materially advance the ultimate termination of litigation properly turns
 16 on pragmatic considerations, assessed by reviewing the procedural and substantive status of the
 17 case with respect to the progress or completion of discovery, the disposition of pretrial motions,
 18 the extent of the parties’ preparation for trial, and the nature and scope of the requested relief.”).
 19 Because personal jurisdiction represents a threshold legal issue, significant expense will be saved
 20 should the Ninth Circuit find *Shopify* applicable here. *See Bikram Yoga Coll. of India & Fitness,*
L.P. v. Raiz, 2012 WL 13012446, *5 (C.D. Cal. 2012) (“Should the Ninth Circuit Court of Appeals
 21 find that this Court does not have personal jurisdiction over Evans, she will avoid incurring
 22 additional expenses, costs, and time litigating in this district.”).⁵

24 ⁵ Questions need not be dispositive of the entire lawsuit to be “controlling.” *United States v.*
 25 *Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959); *Silbersher v. Allergan Inc.*, 2021 WL 292244, *2
 26 (N.D. Cal. 2021) (same); *Gilmore v. Jones*, 2019 WL 4417490, *6 (W.D. Va. 2019) (“Contrary to
 27 Plaintiff’s contention, FSS Defendants’ Motion for Certification is not defeated because the
 Plaintiff’s case would not be entirely terminated by a reversal on this Court’s personal jurisdiction
 determination on appeal. The standard is ‘materially advance termination’ of the litigation, not
 simply ‘termination’ of the litigation.”). Instead, certification is warranted where, as here,

1 First, if the Ninth Circuit ultimately concludes that jurisdiction is lacking, then the case
 2 will be limited to a mere breach of contract claim, which implicates materially different facts and
 3 circumstances. See *United States v. Cath. Health Sys. of Long Island Inc.*, 521 F. Supp. 3d 265,
 4 279 (E.D.N.Y. 2021) (“While there may be some overlap between the discovery for both the
 5 retaliation and [False Claims Act] claims, a dismissal of the FCA claims will streamline
 6 discovery.”). X’s contract claim focuses largely, if not exclusively, on Bright Data’s own efforts
 7 to scrape public data from the X platform. Its tort claims, in contrast, focus largely on scraping
 8 activities of third-parties. Discovery into such facts and circumstances is likely to be both broad
 9 and burdensome, and implicate the interests of numerous third-parties.⁶ Resolving whether a
 10 diversity court can regulate third-party use of Bright Data’s network, therefore, has the potential
 11 to significantly streamline the case. Indeed, because Bright Data has separately moved for
 12 summary judgment on X’s forward-looking contract claim, dismissal of its tort claims for lack of
 13 jurisdiction would eliminate X’s forward-looking claims entirely.

14 Second, even if the Ninth Circuit concludes that personal jurisdiction exists for some of
 15 X’s tort claims, it may conclude that jurisdiction is lacking for others. For example, the Ninth
 16 Circuit could conclude that claims – like the tortious interference claim – that depend on the acts
 17 of third-parties do not satisfy *Shopify*. As just noted, eliminating this claim would substantially
 18 narrow discovery, essentially eliminating the need for any customer-specific evidence. The court
 19 might also conclude, that even if there is jurisdiction over the tortious interference claim, it does
 20 not extend to claims involving non-California users. That would eliminate the need for discovery
 21 relating to Bright Data’s customers worldwide. As such, clarification of the appropriate legal

22
 23 immediate resolution of the question presented would “clarify the issues at [an] early stage of the
 24 litigation (*i.e.*, prior to discovery)” and “resolve whether plaintiff could proceed with claims.” *Jaco*
v. WinCo Holdings, Inc., 2019 WL 2615739, *5 (E.D. Cal. 2019) (granting § 1292(b) motion).

25 ⁶ Even before X amended its complaint to add three new tort claims, X had served 57 document
 26 requests, 12 interrogatories, and 22 requests for admission. Over a third of these requests relate
 27 solely to its tortious interference claim, dealing with customers’ use of Bright Data’s services,
 28 rather than Bright Data’s own scraping activities. (See RFP Nos. 4, 12, 15, 17-22, 30-32, 36, 41,
 45, 46, 56; Interrogatory Nos. 3, 7, 8; RFAs 1-12). These requests would be obviated if there is
 no personal jurisdiction over X’s tort claims.

1 standards would substantially streamline the case if the Ninth Circuit views its *Shopify* decision
2 expansively.

3 **IV. CONCLUSION.**

4 For the foregoing reasons the Court should certify its Order (ECF 67) for immediate appeal.
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Dated: February 22, 2024

Respectfully submitted,

2
3 /s/ Colin Kass

4 Colin R. Kass*
5 PROSKAUER ROSE LLP
6 1001 Pennsylvania Ave., N.W.
7 Washington, D.C. 20004
8 (202) 416-6890
9 ckass@proskauer.com

10
11 David A. Munkittrick*
12 PROSKAUER ROSE LLP
13 Eleven Times Square
14 New York, New York 10036
15 (212) 969-3000
dmunkittrick@proskauer.com

16 Robert C. Goodman (Bar No. 111554)
17 Lauren Kramer Sujeeth (Bar No. 259821)
18 ROGERS JOSEPH O'DONNELL, PC
19 311 California Street, 10th Floor
San Francisco, CA 94104
(415) 956-2828
rgoodman@rjo.com
lsujeeth@rjo.com

20 Sehreen Ladak (Bar No. 307895)
21 PROSKAUER ROSE LLP
22 2029 Century Park East, Suite 2400
23 Los Angeles, CA 90067-3010
24 (310) 284-5652
25 sladak@proskauer.com

26
27 *Attorneys for Defendant Bright Data Ltd.*
28 *Admitted Pro Hac Vice